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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JUN 06 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts and as a member of the professions holding an advanced degree. The petitioner seeks employment as a visual artist and printmaker. At the time she filed the petition, the petitioner was a product designer [redacted] She now works for [redacted], also in New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and several exhibits, many of which duplicate prior submissions.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director's sole stated ground for denial concerns whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on March 18, 2009. The director, in the denial notice, did not elaborate on which (if any) of the three prongs of the national interest test that the petitioner has met. The intrinsic merit of the fine arts is not in dispute here. The petitioner satisfies this requirement. Likewise, fine artists in most media have at least the potential for national scope, through exhibition of their work and, for the most prominent artists, media coverage. The petitioner therefore meets this requirement as well, although this finding is not a stipulation that the

beneficiary, as an individual, has in fact had national impact as an artist. The national scope finding concerns artists in general, not the petitioner in particular.

There remains the third prong of the national interest test, specific to the individual alien and therefore immune to generalized appeals regarding the overall merit of a given occupation.

The initial submission included 16 letters from artists, gallery officials, and university-level art instructors. All but one of those letters are virtually identical apart from identifying information about the signatory of each letter. (Much of the same language also appears in counsel's cover letter.) The AAO will give due consideration to the claims in this letter, but any factual claims have negligible evidentiary weight if not supported by documentary evidence. Multiple submissions of basically the same letter, with only minor variations, do not add to the intrinsic weight or credibility of the claims in that letter. Because all of these witnesses are based in New York City or have demonstrable prior ties to the petitioner, their collective signatures do not support the claim that the petitioner's work has earned her international recognition.

There follow selected common passages from the letters:

> [The petitioner] has demonstrated outstanding talent and abilities in the creative and unusual areas of intaglio, relief/woodcutting, monotypes and screenprinting. . . . [The petitioner] generates innovative and unusual artwork that pushes the boundaries of these medi[a], some of which have antiquated roots dating back to the 15th century. She is part of a small group of Artists who successfully merge old printmaking methods with contemporary practices, making works on paper that simultaneously pay homage to the past and are relevant to today's society. For instance, she has integrated spray-paint, stickers, digital printing and crushed up silicon solar cells into her prints.
>
> Moreover, [the petitioner] integrates her passion for the environment through her inventive and pioneering work. For example, [the petitioner] has created several pieces that are solar powered. [The petitioner's] MFA thesis **"Heliotropia,"** was so innovative that she was invited to exhibit it [at] a show at Seton Hall University in New Jersey. This critically acclaimed work is an interactive sculptural installation where viewers can activate functioning photovoltaic cells imbedded into prints to power small, rotating motors. . . .
>
> [The petitioner] has also channeled her exceptional abilities as an Artist and her support of environmental issues into teaching and promoting an environmentally friendly way of life. . . . [The petitioner] currently teaches workshops about how to use safer and non-toxic printmaking inks. She has taught high school students, school-teachers and adults in a continuing education setting. . . . [The petitioner] is one of the few successful Artists in the world having extensive experience working with water-based printmaking inks.

> . . . The contributions that [the petitioner] has made and will continue to make to the United States in the area of the visual arts as well as environmental causes will definitely foster the national goals of development of the Arts, Culture and Humanities in the United States as well as attract international visitors to view [the petitioner's] unique and innovative works of art, a fact that will also contribute to the U.S. economy.

Some letters contain occasional, small variations from the above wording, but they generally share the same traits, such as the word "Heliotropia" in bold type and the arbitrary capitalization of the word "Artist." The shared language refers to an art piece called [redacted] Some letters show the name as [redacted] consistent with electronically copying and pasting language into a font that does not support the "♥" character.

[redacted] provided the only initial letter that did not include the shared language. Nevertheless, [redacted] appears to have used that letter as a template, imparting basically the same information in the same order. For example, the shared language includes the following passage:

> [The petitioner's] background and impressive credentials are truly outstanding. [The petitioner] received her BA *magna cum laude* in Visual Studies from the prestigious University of Toronto. **Here, [the petitioner] earned a total of nine academic awards.** This is almost unheard of even among the very top Artists in the world. **One of the awards [the petitioner] received is the John Wolfe McColl Memorial Award in Fine Arts.** This prestigious award is given to Specialists in Visual Studies who display a combination of advanced artistic insight, achieve high academic merit, and make invaluable extracurricular contributions to the department.

(Emphasis in original.) [redacted] letter imparts the same information in different words:

> [The petitioner's] background and impressive credentials are equally outstanding. She received her Bachelor of Arts *magna cum laude* in Visual Studies from the prestigious University of Toronto. Most impressively, during her studies she earned a total of **nine** academic awards. This is most unusual, even among the most elite of artists. One of the more prestigious awards she received is the [redacted] which is presented to artists who display a combination of advanced artistic insight, high grade-point average, artistic merit and valuable extracurricular contributions to the department.

(Emphasis in original.) The petitioner did not submit sixteen distinct witness letters. She submitted, in effect, the same letter signed by sixteen people.

In terms of objective evidence, the petitioner submitted photographs and other materials relating to exhibitions of her work. These materials show that the exhibitions took place, but they do not inherently distinguish her work, or its impact, from that of countless other artists who likewise place their work on public display.

Promotional materials for "Queens International 4," a 2009 art exhibition, do not list the petitioner among the participating artists. A handwritten notation indicates that the petitioner "participated as a[n] SP weather data interpretation artist" for a piece by [redacted] The petitioner's involvement with that exhibition appears to have been peripheral at best.

The exhibitions, simply by taking place, do not establish the significance or impact of the petitioner's work. It is, therefore, necessary to consider the evidence surrounding critical and public reaction to the exhibited works. The petitioner submitted copies of articles from local media, announcing and/or reviewing various exhibitions. Many of the articles do not mention the petitioner at all.

A post from *blogchelsea* offers brief comments on a number of pieces in the "Protest Space" exhibition, including the observation that the petitioner's "*Little Brown Barf Bag* is the perfect zing at materialist culture." A notice from *Philadelphia Weekly Online*, promoting the then-upcoming "Art at LAVA" show, listed participating artists and noted that the beneficiary is "best known for her tricky solar-powered creations." A paragraph in *Eye* announced the opening of the beneficiary's nine-day solo exhibition, "Several Incidents of Mushroom Poisoning." The college newspaper *The Varsity* reviewed the group student exhibition "All-Inclusive," devoting a paragraph to a description of the petitioner's "series of cyanotype prints in murky shades of blue." In another *Varsity* review, the same reviewer discussed the group student show "Exhibit A," including the petitioner's photo collages involving [redacted] "Repeat After Me," co-cu[redacted] that show "plays on the t[redacted] planet by tiny machines, but with self-replicating rainbows instead of robots."

The petitioner did not show how the coverage of her work in local and student publications sets her apart as an artist. The submitted materials contain mention of many other artists as well, and do not show that the petitioner's work has attracted attention beyond the community level.

In a request for evidence (RFE) dated November 20, 2009, the director requested "additional documentary evidence to establish that the beneficiary has a past record of specific prior achievement, which justifies projections of future benefit to the national interest."

In response, counsel stated:

> [The petitioner's] academic and professional career as a Visual Artist and Printmaker as well as an Educator is truly illustrious as evidenced by the numerous awards and accolades she has received. In addition to the nine academic awards [the petitioner]

> has garnered, she most recently won two additional awards, namely the **Brooklyn Arts Council Grant** and the **Jurors Award**. The awards, honors and acclaim she has received are clear evidence that [the petitioner] has received are clear evidence that [the petitioner] is a talented and extraordinary Artist who is skilled well beyond her years.

The record shows many of the claimed "awards" to be student financial aid, with little or no indication that the aid was contingent on the petitioner's talent or accomplishments as an artist. Furthermore, recognition for achievements is a criterion of exceptional ability under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F). By statute, aliens of exceptional ability in the arts are generally subject to the job offer requirement. Clearly, evidence that provides partial support for a claim of exceptional ability cannot suffice to show eligibility for an additional benefit over and above that immigrant classification.

Counsel states that the petitioner serves the national interest because her "unique and brilliant body of work . . . achieves the artistic and educational goals of our nation" and "allows the United States to equal, if not, surpass the abilities of artists throughout the world, thereby enabling the U.S. to be regarded as one of the most prominent countries in the field of visual art."

The petitioner's response to the 2009 RFE included letters from nine new witnesses, each containing various passages copied from the same template used in the letters from the original submission, such as the doubly-emphasized reference to "**nine academic awards**" and the sometimes-garbled references to the petitioner's [redacted] art installation. Many of these witnesses, unlike the earlier witnesses, hail from outside New York City, but the petitioner adds little of substance to the record by having witnesses in Miami and Toronto repeat language already in the record of proceeding.

The petitioner also submitted new letters from five of the individuals (all based in New York) who provided the first set of witness letters. This time, the letters do not rely on copied, shared language. Carla Aspenberg, an artist and curator, stated:

> Although I have worked with other artists, I consider my experience with [the petitioner] one of the best. I was honored to co-curate the exhibit titled "Repeat After Me" at the Flux Factory gallery space in New York City. . . . The theme of self-replication was [the petitioner's] original thought provoking idea that allowed artists to explore pertinent issues surrounding the evolution of technology.
>
> [The petitioner] is also one of the few outstanding visual artists in the United States who applies non-toxic techniques to traditional forms of printmaking methods.

[redacted] stated:

> [The petitioner's] influence has already and will continue to reach far beyond any border and/or state lines. Her power and impact in the field of visual arts is truly

> international. In addition to creating work that moves people and attracts widespread attention, [the petitioner] is also educating and inspiring a new generation of artists and her uniqueness, excellent credentials and abilities make her capable of producing a widespread positive contribution to the arts as well as our nation's cultural identity.

The petitioner submitted no objective evidence to show that her work "attracts widespread attention." Rather, the petitioner submitted letters from close associates making claims to that effect.

[redacted], program director at LESP, stated:

> As Programs Director, I have had the honor of reviewing approximately 1000 applications each year from individual artists . . . for a place in our residency programs alone. Based on this experience and my background, I would like to reiterate that [the petitioner's] extensive body of work has achieved widespread acclaim and recognition.
>
> It is in recognition of her extraordinary abilities in printmaking that she was awarded the Printshop's prestigious Keyholder residency.

The letter quoted above is on printed letterhead, showing the address of [redacted] Information on that site contradicts [redacted] claim that the petitioner's Keyholder residency demonstrates the petitioner's expertise and "widespread acclaim and recognition":

> The Keyholder Residency Program offers emerging artists free 24-hour access to printmaking facilities to develop new work and foster their artistic careers. Residencies are free and one year long, starting on April 1st and October 1st each year, and they take place in the shared Artists' Studio, including the solvent/etching area and the darkroom.
>
> Keyholders work independently, in a productive atmosphere alongside other contemporary artists. Artists from all disciplines are eligible to apply; print-making skills are not required, but some familiarity with the medium is recommended. Basic instruction in printmaking techniques is available for new Keyholders. Technical assistance is not included in the program, but is available at additional cost.

http://printshop.org/web/Create/KeyholderResidences/index.html (printout added to record May 31, 2011). If "print-making skills are not required" to qualify for the Keyholder residency, then it is far from self-evident that the beneficiary received the residency "in recognition of her extraordinary abilities in printmaking."

Furthermore, "Keyholder Residencies are limited to emerging artists only. The Printshop defines emerging artists as under-recognized and under-represented artists at early stages in their careers."

http://www.printshop.org/web/Create/KeyholderResidences/Guidelines.html (printout added to record May 31, 2011). This indicates that "widespread acclaim and recognition" would disqualify an applicant for the residency.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The above claims that contradict the [redacted] own information compound the credibility issues that arose from the petitioner's submission of multiple letters containing the same language.

[redacted] hired the petitioner as a master printer "to create a special edition of fifty prints" for a charity event:

> [The petitioner] was able to teach me about the printing process and printmaking techniques that I continue to use and teach. She instructed me through every step of the screenprinting process from buying the correct materials, burning the screens, mixing the inks, achieving accurate registration of the image, to pulling the 5-color prints. It was indeed a long and challenging process that I could not have completed without [the petitioner's] adept guidance.

[redacted]at the petitioner "was awarded the prestigious **Jurors Award** from the Longwood Art Gallery at Longwood University" (emphasis in original) The record documents the petitioner's receipt of the award, but no evidence to support the subjective description of the award as "prestigious." Noting that the petitioner "has several **permanent installations** of her work across the US and Canada" (emphasis in original), [redacted] makes the unsubstantiated claim that "[t]his is unheard of among artists at her age."

Several witnesses note that New York is a center of the art world, and therefore art students, collectors and enthusiasts from around the country encounter the petitioner's work when they come to New York. The same can be said of countless other artists and art teachers in New York. Rather than provide any concrete demonstration of the petitioner's influence in comparison to that of other working artists, the witnesses have provided anecdotal accounts of their own encounters with the petitioner and/or her work. These assertions do not show how the petitioner stands out from other artists and art educators, to an extent that she should receive an immigration benefit that is not automatically available to workers in her field.

The director denied the petition on February 4, 2010, stating that the petitioner had not submitted independent reviews or other evidence to establish the prestige or influence of the petitioner's work in comparison with the work of other artists.

On appeal, counsel repeats prior assertions about "the petitioner's unique and brilliant body of work" and states: "the Director overlooked or failed to consider the compelling evidence of petitioner's past achievements and abundant evidence that the petitioner would serve the national interest to a greater

extent than the majority of her peers." In the appellate brief, counsel charged: "the Director failed to consider the overwhelming evidence submitted by the petitioner which clearly confirmed the petitioner's important achievements, influence in her field, and outstanding stature as a Visual Artist, Printmaker, and Educator." Merely calling the evidence "compelling" and "overwhelming" does not make it so, notwithstanding counsel's assertion that "[t]he petitioner's record of achievement is exemplary and speaks for itself." The AAO will therefore consider counsel's arguments in support of this claim.

Counsel asserts: "The petitioner/applicant's impressive body of work has been universally acknowledged as exceptional and she has commanded the respect of leading experts in the field." The petitioner has not shown that her selection of witnesses comprise "leading experts in the field," or so broad a consensus as to represent "universal" acknowledgment of her reputation. Favorable claims do not become "universal" merely through verbatim repetition in some two dozen letters.

Counsel lists the 24 witnesses, and claims that "the writers based their judgments on their independent observations." This claim is patently and obviously false, because the letters clearly contain substantial, identical passages. To assert that each of these 24 witnesses independently arrived at the same wording and emphasis defies credulity. At best, some witnesses have embellished the template to somewhat personalize the text.

Counsel spells out the ways that the petitioner purportedly benefits the United States:

> Petitioner's innovative works which promote environmentalism and sustainability are recognized as being at the forefront of an international art movement integrating art, lifestyle, and consciousness of important issues affecting our nation and its environment. Further, the petitioner's groundbreaking work which promotes awareness of important environmental issues affecting our nation and utilizes eco-friendly materials, present new and effective methods to educate the public about emergent environmental concerns. Similarly, the petitioner's groundbreaking teaching of the methods and importance of the use of non-toxic inks and other non-toxic materials by artists, in general, and by teachers and students in the school system where children may be at higher risk, present new and effective methods of educating the public about important health concerns, as well as present important solutions for avoiding health risks. The petitioner's exceptional knowledge, teaching and contributions relating to older printmaking techniques that are known by only a very limited number of artists worldwide such as petitioner, assists in both revitalizing interest in, and preserving the knowledge and tradition of, these special methods.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel quotes from witness letters to support the above claims, but factors already discussed severely limit the evidentiary value of those letters. Indeed, many of the

quoted passages, attributed to a particular witness, are common passages that appear in numerous other letters.

The record demonstrates the petitioner's commitment to creating and promoting more environmentally responsible art. Nevertheless, the record is devoid of objective, verifiable evidence that the petitioner is, as claimed, an influential leader at the forefront of that movement.

Counsel submits information about various exhibitions that have included the petitioner's work. Many of the exhibitions took place after the petition's March 2009 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Furthermore, the information provided, even on its face, fails to support counsel's claims. For example, counsel emphasizes that "*Philagrafika 2010 will be one of the largest art events in the United States*" (counsel's emphasis). The exhibition's own materials stress the expansive size, stating that the event incorporates the work of "more than 300 artists." By definition, such an event must be especially inclusive, rather than exclusive; otherwise, it could not be "one of the largest art events." The petitioner's inclusion in an exceptionally large group exhibition points away from, rather than toward, her claimed uniqueness and standing in her field.

Counsel observes that some of these exhibitions were the focus of media attention, thereby highlighting their importance. The petitioner has not, however, shown that her work in particular has attracted such attention. The petitioner cannot establish eligibility by association, through attachment to a movement that is, overall, nationally significant.

The AAO agrees with the director's finding that the petitioner has not established eligibility for the national interest waiver.

Beyond the director's decision, the record reveals an even more fundamental basis for denial of the petition. The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Apart from the question of whether the beneficiary qualifies for a national interest waiver, a more fundamental issue is the beneficiary's eligibility or otherwise for the underlying immigrant classification, either as a member of the professions holding an advanced degree or as an alien of exceptional ability in the arts.

The director, in the denial notice, stated: "USCIS accepts that an advanced degree or exceptional ability is required by the occupation, and that the petitioner holds the requisite advanced degree." The director deemed the question of exceptional ability "moot." The AAO disagrees with this finding, and therefore will withdraw it.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) includes the following definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. . . .
>
> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The petitioner's initial submission focused on the claim of exceptional ability in the arts. In response to the RFE, however, counsel claimed that the petitioner "is both an Advanced Degree Professional and an Alien of Exceptional Ability. [The petitioner] holds a Master's of Fine Arts degree . . . from Brooklyn College." Possession of an advanced degree, however, is not sufficient to show eligibility for classification as a member of the professions holding an advanced degree, because one may hold an advanced degree without working in a profession. In this instance, section 101(a)(32) of the Act does not list artists, and the petitioner has not shown that a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the petitioner's occupation.

Section 101(a)(32) of the Act lists "teachers in elementary or secondary schools, colleges, academies, or seminaries." The limiting reference to "schools, colleges, academies, or seminaries" indicates that teaching is not always presumed to be a profession, regardless of context. In this instance, the petitioner identifies herself as, among other things, an educator, but the petitioner does not teach at a school, college, academy or seminary. Also, the petitioner has not shown that she is and will be, first and foremost, a teacher (as opposed to an artist with some ancillary teaching functions). The petitioner has not shown that her intended principal endeavor qualifies as a profession. The petitioner, for example, has created and shown art works at several exhibitions, but the record contains no evidence that the exhibitors will only show works by artists holding at least a baccalaureate degree.

As late as the appeal, counsel erroneously claims that the petitioner is a member of the professions holding an advanced degree merely because she holds an advanced degree. Counsel makes no attempt to show how she meets the other half of the description as a "member of the professions."

For the above reasons, the AAO withdraws the director's finding that the beneficiary's advanced degree qualifies her for the classification sought. As a result, the AAO must now turn its attention to the question of exceptional ability.

In an introductory brief, counsel asserted that the petitioner "qualifies for classification as an Alien of Exceptional Ability in the Arts pursuant to 8 C.F.R. § 204.5(k)(3)(ii)." Counsel did not, however, explain how the petitioner meets the specific requirements under that regulation. Counsel instead relied on general assertions that the petitioner "has most definitely risen to the top of the field of art," "[u]nquestionably . . . has achieved a degree of expertise significantly above that ordinarily encountered," and "has truly set herself apart and has garnered sustained recognition and acclaim."

The cited regulation at 8 C.F.R. § 204.5(k)(3)(ii) states that, to show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered" in the arts. 8 C.F.R. § 204.5(k)(2). *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. While involving a different classification than the one at issue in this matter, the

similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter.

Counsel stated that the petitioner satisfied clauses (A) and (F) above, and claimed "other comparable evidence showing eligibility, for example the fact that [the petitioner] has been awarded many artistic grants and awards and has been asked to judge the work of others."

To invoke the "comparable evidence" clause at 8 C.F.R. § 204.5(k)(3)(iii), the petitioner must demonstrate that "the above standards do not readily apply to the beneficiary's occupation." If the standards do apply to that occupation, the beneficiary's personal inability to meet those standards does not trigger the comparable evidence clause. In this instance, the petitioner has neither claimed nor demonstrated that clauses (B), relating to experience, or (D), relating to remuneration, do not readily apply to the petitioner's occupation. At least four of the six regulatory standards readily apply to the petitioner's occupation. Therefore, the petitioner has not justified recourse to the comparable evidence clause at 8 C.F.R. § 204.5(k)(3)(iii).

Counsel does not explain (and the petitioner does not prove) which of the six regulatory standards do not readily apply, or show how the proposed alternatives are comparable to those clauses. The petitioner cannot unilaterally exempt herself from the listed evidentiary standards and declare her own accomplishments to be "comparable evidence." In the final merits determination, the AAO will examine any evidence outside of the specified standards that reasonably demonstrates exceptional ability, but the AAO notes here that the petitioner claims to meet only two of the six defined regulatory standards for exceptional ability.

The AAO agrees that the beneficiary's academic degrees satisfy the standard at 8 C.F.R. § 204.5(k)(3)(ii)(A). The petitioner has claimed numerous awards as evidence of recognition under 8 C.F.R. § 204.5(k)(3)(ii)(F). Most of these claims fail to withstand scrutiny (for example, one claimed award was actually a letter regarding the beneficiary's eligibility for reimbursement of travel expenses), but the record documents the petitioner's receipt of the Jurors Award at the Sustainable Source National Exhibition at Longwood University, Farmville, Virginia. The beneficiary was never a student at that university, and her studies were complete well before she received the award in 2008. The record does not support the sometimes hyperbolic claims about the significance of this award, but it nevertheless demonstrates recognition of the type contemplated in the pertinent regulation.

The petitioner satisfies two of the six regulatory standards listed at 8 C.F.R. § 204.5(k)(3)(ii), and has not claimed to satisfy any of the other four. This, on its face, is an insufficient claim of exceptional ability in the arts.

In terms of what counsel deems "comparable evidence," counsel cited the beneficiary's receipt of awards. Awards, however, already fall under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) as evidence of recognition. The petitioner cannot claim them again as comparable evidence.

Elaborating on the assertion that the petitioner "has been asked to judge the work of others," counsel stated: "It is truly a mark of [the petitioner's] reputation in the field as well as her outstanding acumen that she has been invited to be a guest curator." This unproven assumption would not be sufficient, even if other credibility issues did not already plague the record of proceeding.

Counsel, on appeal, states that "the exceptional ability classification . . . was surely never intended to be unduly restrictive and reserved only for a few household names in the field." The AAO agrees, but finds nothing in the director's decision to the contrary. The petitioner need not be a "household name" to qualify as an alien of exceptional ability in the arts. Nevertheless, the record contains numerous claims as to how important and influential the petitioner is within her field. Having made those claims, the petitioner must support them, and fails to do so at her credibility's peril.

The petitioner satisfies only two of the regulatory standards for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Counsel's claims regarding comparable evidence are not persuasive, and the petitioner has made no attempt to show that the other regulatory standards do not readily apply to her occupation (which is necessary before USCIS can begin to entertain "comparable evidence" claims).

Therefore, the AAO finds that the petitioner has not shown that she qualifies for classification, either as a member of the professions holding an advanced degree or as an alien of exceptional ability in the arts. Furthermore, on the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.